IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-994

MYRON ERSKINE, an Attorney,

Petitioner,

—v.—

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, FIRST DEPARTMENT, OF THE SUPREME COURT OF THE STATE OF NEW YORK

RESPONDENT'S BRIEF IN OPPOSITION

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Preliminary Statement

This is a petition for a writ of certiorari to review the order of the Appellate Division, First Department, of the Supreme Court of the State of New York (hereinafter referred to as "the Appellate Division"), made and entered on November 4, 1971, suspending petitioner from the practice of law in the State of New York for a period of eighteen months. On December 2, 1971, the Court of Appeals for the State of New York granted a motion to dismiss petitioner's appeal upon the ground that no sub-

stantial constitutional question is directly involved and denied petitioner's motion for leave to appeal, 29 NY2d 487, 875.

ARGUMENT

POINT

The Immunity Afforded Petitioner Was Co-extensive With the Scope of the Privilege Against Self-incrimination and Did Not Afford Immunity Against Disciplinary Proceedings.

Self-incriminating testimony may be compelled by a grant of immunity co-extensive with the scope of the privilege, *Counselman* v. *Hitchcock*, 142 U.S. 547. Since the privilege itself prohibits the use of compelled testimony only in a criminal case, and petitioner admittedly received immunity from criminal prosecution when he testified before the Grand Jury, it follows that the constitutional provision has been satisfied and that petitioner's testimony was not improperly compelled.

The license to practice law constitutes a certification to the public that the holder has been examined with respect to both character and learning and has been found to be reliable. When that certification and the holder's entitlement thereto is called into question, a disciplinary proceeding is the means by which the continued fitness of the holder is determined.

Consequently, since disciplinary proceedings are civil rather than criminal in nature, *Ex Parte Wall*, 107 U.S. 265, 288, the immunity conferred upon petitioner did not prohibit the filing of charges of misconduct predicated upon the subject matter of his testimony before the Grand Jury.

In an effort to overcome the clear wording of the constitutional provision, petitioner relies primarily on *Spevack* v. *Klein*, 385 U.S. 511, and other related cases and argues that they have expanded the term "in any criminal case" as used in the Fifth Amendment to include disciplinary proceedings. We respectfully submit that petitioner's reliance is misplaced and that nothing contained in any decision of this Court warrants such a conclusion.

The plurality opinion in *Spevack* indicates that the Court did not expand the scope of the privilege but rather found that the act of the State, disbarment, was an improper penalty imposed on an attorney for invoking his constitutional privilege not to incriminate himself "in any criminal case".

It follows, therefore, that this Court reversed the disbarment in *Spevack*, not because the attorney there involved had the right to refuse answers which might tend to subject him to discipline (such question being outside the scope of the privilege), but because disbarment was an improper penalty for the attorney's exercise of his constitutional right not to answer questions which might tend to incriminate him, he, unlike petitioner here, having no immunity from criminal prosecution.

The fact that this Court's decision in *Spevack* turned upon a finding of an improper sanction rather than expansion of the scope of the privilege against self-incrimination appears from the related case, decided the same day, of *Garrity* v. *New Jersey*, 385 U.S. 493. There the Court prohibited the use by the prosecution at a criminal trial of testimony compelled by threat of loss of job upon refusal to answer for any reason. This Court concluded that the

testimony elicited and sought to be used in support of criminal charges against the defendants, who, unlike petitioner here, did not have immunity from criminal prosecution, had been improperly compelled. Thus, this Court speaking through Mr. Justice Douglas, stated, 385 U.S. at p. 497:

> "The choice given petitioners was either to forfeit their jobs or to incriminate themselves. The option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent."

It is evident that this Court did not expand the scope of the privilege but concerned itself with a determination of conduct by the State which constituted improper compulsion directed toward an individual to force him to waive his existing privilege against self-incrimination.

It should be noted, moreover, that the present case is factually as well as legally distinguishable from *Spevack* and the other cases cited by petitioner, *Zuckerman v. Greason*, 386 U.S. 15, rehearing denied, 386 U.S. 969, and *Matter of Klebanoff*, 393 U.S. 840, denying certiorari to 21 N.Y.2d 920. Petitioner here, unlike any of the attorneys in the cited cases, received immunity from criminal prosecution after first invoking his privilege against self-incrimination. In each of the cases cited by petitioner the attorney was faced with the still existing possibility that he might be subject to criminal prosecution for any crime disclosed if he answered, while petitioner had been granted complete immunity from such prosecution.

In addition, petitioner also asserts contentions predicated upon other decisions of this Court, principally *United*

States v. *U. S. Coin & Currency*, 401 U.S. 715, and *Boyd* v. *United States*, 116 U.S. 616. Petitioner's claims find no support in the opinions relied upon. *Boyd* and subsequent decisions of this Court which followed it, are distinguishable. As the Court noted in *Plymouth Sedan* v. *Pennsylvania*, 380 U.S. 693, 701, the *Boyd* situation required a determination that the criminal law had been violated, the forfeiture there sought being authorized as an alternative to imprisonment and/or fine in the same statute. In *United States* v. *U. S. Coin & Currency*, a similar determination was required since the forfeiture statutes, when viewed in their entirety, were intended to penalize only persons significantly involved in criminal enterprise. Accordingly, if the claimants there were compelled to give testimony, they would be asked to provide evidence to establish violations of what this Court concluded were essentially criminal statutes, i.e., to incriminate themselves.

In *Ullmann* v. *United States*, 350 U.S. 422 (1956), also cited by petitioner, the Court held that the immunity granted did not violate the Fifth Amendment because it provided against criminal prosecutions and, therefore, was sufficiently broad to displace the protection afforded by the privilege against self-incrimination.

This Court has continued to recognize the essential civil nature of disciplinary proceedings since the decision of *Ex Parte Wall*, *supra*, in 1882. Its rules concerning the discipline of attorneys admitted to its bar have been predicated upon that assumption. Thus, where it is shown to this Court that any member of its bar has been guilty of misconduct, he is forthwith suspended from practice and thereupon offered the opportunity to show good cause why he should not be disbarred (Revised Rule 8). Contrary to the

procedure applicable to criminal cases, the "accused" is thereby required to come forward to explain his conduct.

In summary, it is respectfully submitted that petitioner's contention that the immunity he received from prosecution for any crimes revealed in his testimony before the Grand Jury also immunized him against any disciplinary proceeding is clearly without merit. Adoption of that proposition would mean, for example, that an attorney who had negotiated as an intermediary in the bribery of a public official and had been given immunity from prosecution for the crime in order that his testimony might be used in criminally prosecuting that public official, would thereafter not only be immune from prosecution for his own crime but would have to continue to be certified as an attorney in good standing by all the courts to which he was admitted and could even continue to practice before the very agency he had helped to corrupt. Such an astounding proposition finds no support in the Fifth Amendment or in any of the decisions of this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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